Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

CITY OF NEW YORK, JASON TURNER, individually and in his capacity as Commissioner of New York City Human Resources Administration, GEORGE SANTIAGO, in his individual capacity,

Petitioners.

-against-

UNITED STATES OF AMERICA, NORMA COLON, MARIA E. GONZALEZ, TAMMY AUER, THERESA CALDWELL-BENJAMIN,

Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the holding to the United States Court of Appeals for the Second Circuit stating that WEP participants are employees with recourse to a remedy for discrimination pursuant to Title VII conflict with:

1) the federal common law criteria for employment, as stated in Johns v. Stewart, 57 F3d 1544 (10th Cir. 1995), O'Connor v. Davis, 126 F3d 112 (2d Cir. 1995) and elsewhere; and

2) the language of PRWORA, which limits applicable nondiscrimination provisions to four enumerated statutes, not including Title VII?

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Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Second Circuit, from which petitioners seek certiorari, was decided on February 13, 2004. The opinion is reported at 359 F3d 83 (2d Cir. 2004), and appears in the Appendix at A1-52. Petitioners filed a petition for rehearing en banc. The Second Circuit denied that petition,

which denial was entered on May 27, 2004. It appears in the Appendix to this Petition at A55-74. [1]

Prior to trial, the United States District Court for the Southern District of New York, on March 8, 2002, granted the petitioners' motion to dismiss all claims against them. That opinion and order is not reported. It appears in the Appendix at A53-72.

JURISDICTION

The Second Circuit issued its judgment on February 13, 2004 (A1). The Second Circuit issued an order denying rehearing en banc on May 27, 2004 (A72-a). This Court has jurisdiction to review this judgment under 28 U.S.C. §1254.

STATUTORY PROVISIONS

The text of the following pertinent constitutional provisions and statutes may be found in the Appendix at A75-278.

United States Code

> **Title 42, Chapter 7, Sections 601 *et seq.*, Grants to states for aid and services to needy families with children and for child-welfare services**

New York Social Services Law

> **Section 330 *et seq.*, Public assistance employment programs.**

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[1] Numbers preceded by the letter "A" refer to the pages of the Appendix of this Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

A. Nature of Case

By complaint dated May 31, 2001, the United States commenced the instant suit alleging discrimination in violation of Title VII. The complaint names as individual complainants Tammy Auer, Tonja McGhee,[2] Maria Gonzalez, and Theresa Caldwell-Benjamin ("individual complainants"), all of whom were participants in New York City's Work Experience Program ("WEP") who filed complaints with the Equal Employment Opportunity Commission ("EEOC") alleging a hostile work environment.[3] The EEOC, in turn, referred the individual complainants to the Department of Justice. As relief, the complaint seeks compensatory damages for the individual complainants, and an order barring discriminatory practices in WEP and directing the instant petitioners (jointly referred to herein as "the City") to take such affirmative steps as may be necessary to prevent such practices. By motion dated July 12, 2001, accompanied by a complaint, plaintiffs Gonzalez, Auer, Caldwell-Benjamin, and McGhee subsequently sought to join the case as intervenors.

By motion dated July 20, 2001, the City sought dismissal of the action brought by the United States, on the

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[2] Ms. McGhee has since settled with petitioners and retains no claims.

[3] Solely for the purpose of this appeal, the City deems the factual allegations in the United States' complaint, and in the subsequent complaint filed by Tammy Auer, to be true.

ground that WEP workers are not "employees" under Title VII and that, consequently, the Court lacked subject matter jurisdiction, and the United States had failed to state a claim upon which relief could be granted .

By complaint dated September 28, 2001, plaintiff-appellant Norma Colon ("Ms. Colon") commenced an action against the City of New York, HRA Commissioner Jason Turner, and her work supervisor for sex discrimination in violation of, *inter alia,* Title VII. Although Ms. Colon had been one of seven WEP participants who originally complained to the EEOC, the U.S. Attorney, after conducting an investigation, had chosen not to include her claim in its suit against the City.

By similar motion dated November 13, 2001, the City sought to dismiss Ms. Colon's complaint. The grounds stated by the City were the same as had been asserted in the motion to dismiss the United States action.

For pre-trial purposes, the District Court consolidated the actions brought by Ms. Colon and by the United States.

B. Statement of Relevant Facts

WEP is designed to comply with requirements of the New York Social Services Law ("SSL"),[4] which in turn were designed to comply with requirements of the federal welfare reform act, known as the Personal Responsibility

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[4] Discrimination against work experience participants is illegal under SSL § 331(3). The City is strongly committed to enforcing this provision and to preventing discrimination against WEP participants.

and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-93, 110 Stat. 2105 (1996).

What is popularly termed "welfare reform" was established by the PRWORA and codified in relevant part in the Social Security Act at 42 USC. § 601, *et seq.* PRWORA created a new federally funded welfare program, Temporary Assistance to Needy Families ("TANF"), which replaced Aid to Families with Dependent Children ("AFDC").

The statutory purpose of PRWORA is set out at 42 U.S.C. § 601, which states: "The purpose of this part is to increase the flexibility of States in operating a program designed to:...." The statute then lists four program goals: 1) provide assistance to needy families so that children can remain in their own homes; 2) end the dependence of needy parents on government benefits through job preparation, work, and marriage; 3) prevent and reduce out-of-wedlock pregnancies; and 4) encourage two-parent families. Id.

In accordance with this statutory purpose, PRWORA contains an explicit prohibition of all federal regulation of state conduct and of all federal enforcement, other than as expressly provided in the act:

> § 617 Limitation on Federal authority:
>
> No officer or employee of the Federal Government may regulate the conduct of States under this part or enforce any provision of this part, except to the extent expressly provided in this part.

PRWORA defines an "eligible State" as one that has submitted a plan to the Secretary of Health and Human Services ("HHS") describing, *inter alia*, how the state will "conduct" a "family assistance program" designed to serve all political subdivisions in the State. 42 USC § 602(a)(1)(A)(i). The plan must include certifications by the chief executive officer of the state, concerning, *inter alia*, which state agencies will administer and supervise the family assistance program. § 602(a)(4). Each state receives a grant based on enumerated factors, § 603, and is subject to penalties, in the form of reductions in the grant amount, for noncompliance with PRWORA requirements. § 609.

In 1997, New York State enacted a welfare reform act that complies with TANF. L. 1997, c. 436. The State Commissioner of Labor is responsible for operating and administering public assistance work activities programs. SSL § 337. This provision is consistent with the general framework of the SSL, which provides that the State has overall charge of social services programs. SSL §§ 17(a); 20(2)(b); 20(3)(a); 34(3)(f). The City of New York is a local "city social services district," SSL § 61(1). Subject to reimbursement by the State, the City is responsible for providing assistance and care to anyone in the City who is in need of such support, which he "is unable to provide for himself." SSL § 62(1). However, "the local commissioners [of social services] act on behalf of and as agents for the State." Matter of Beudoin v. Toia, 45 NY2d 343 (1978). Local social services districts must submit to the State biennial plans for the provision of work activities programs. SSL § 333.

Under PRWORA, certain percentages of welfare recipients must participate in "work activities." 42 USC § 607(a). Twelve types of activities are defined as "work activities," 42 USC § 607(d); one is "work experience," which is described as follows: "work experience (including

work associated with the refurbishing of publicly assisted housing) if sufficient private sector employment is not available." 42 USC § 607(d)(4). Other listed work activities include job search and job readiness assistance, community service programs, and job skills training directly related to employment. 42 USC § 607(d)(6),(7),(9). It is noteworthy that "work experience" is distinguished from "unsubsidized employment," "subsidized private sector employment," and "subsidized public sector employment," each of which is listed as a separate and distinct work activity. 42 USC § 607(d)(1)-(3). The state law work activities provision tracks the federal provision in most significant respects, and refers to "work experience in the public sector or non-profit sector, (including work associated with refurbishing publicly assisted housing) if sufficient private sector employment is not available." SSL § 336(1)(d).

C. Federal Jurisdiction of the District Court.

The District Court had jurisdiction of the original action herein pursuant to 42 USC § 2000e-5(f) and 28 USC §§ 1331 and 1345.

D. District Court's Opinion and Order Granting the City 's Motion to Dismiss the Complaint.

By an opinion and order (one paper) dated March 8, 2002, the District Court granted the City's motion to dismiss the complaint in its entirety on the ground that the Court lacked subject matter jurisdiction and that the complaint fails to state a claim on which relief may be granted.

The District Court found it "unnecessary to make a broad determination about whether Congress intended for Title VII to apply to PRWORA," holding instead that "the

WEP participants herein cannot be considered 'employees' for Title VII purposes" (A65-66). Noting that Title VII protects from discrimination only those plaintiffs who are employees, the District Court looked initially to the prerequisite to the common law agency test, as articulated in O'Connor v. Davis, 126 F3d 112, 115 (2d Cir. 1997), *i.e.*, whether the working individual was actually hired by the defendant (A67-68). The District Court noted that there is not allegation in the pleadings that any of the plaintiffs were hired by the City, but that each was instead "assigned" to a work situation (A68)

Moreover, the District Court observed, the instant plaintiffs "did not receive employment-related benefits," such as sick pay, health insurance, vacation time, disability pension, survivors' benefits, group life insurance, or scholarships for their dependents upon their death (A69-70). Furthermore, "[i]f the participants did not comply with the WEP, their family's benefits were not terminated" (A70). Such benefits as plaintiffs did receive "resulted from their status as welfare recipients" (A70). The District Court concluded that, "[i]n the clear absence of either direct or indirect economic remuneration by the Defendants, the WEP participants here are not employees within the meaning of Title VII and their discrimination claim under that statute must fail" (A70-71).

E. The Opinion of the United States Court of Appeals for the Second Circuit

By opinion and order dated February 13, 2004, the Second Circuit, in a 2-1 decision, vacated the judgment of the District Court and remanded the case for further proceedings (A1-52).

The Majority Opinion Regarding Coverage under Title VII

The majority opinion disputed the conclusion of the District Court that the instant plaintiffs are not employees within the meaning of Title VII. Like the District Court, the majority cited O'Connor v. Davis, which holds that the plaintiff must show that she: 1) was hired by the putative employer, and 2) received remuneration for her work in some form (A15). The majority opined that because the plaintiffs had alleged that they "received cash payments and food stamps in return for their work for the city," and these "equaled the minimum wage times the number of hours the plaintiffs worked," plaintiffs had met the remuneration requirement (A16).[5] In addition, the majority stated, plaintiffs "received other benefits including transportation and child care expenses and eligibility for workers' compensation because of their work" (A16). Finally, the majority cited the EEOC compliance manual, which states: "A welfare recipient participating in work-related activities as a condition for receipt of benefits will likely be an 'employee'" (A17).

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[5] The majority's assertion that the payment received by a WEP participant correlates directly to the numbers of hours worked is a factual error. There is no required correlation between the number of hours a beneficiary is assigned to participate in WEP and the amount of assistance received. There is simply a ceiling on the number of hours the beneficary may work, that is equal to the amount of the cash assistance plus food stamps, divided by the minimum wage. SSL §336-c(2)(b). Beneficiaries may be assigned to work fewer hours.

In the majority's view, the instant plaintiffs are differently situated from those in Johns v. Stewart, 57 F3d 1544 (10th Cir. 1995), in which the court found that participants in a Utah public assistance program requiring the recipients' "participation in a broad range of adult education, short-term skills training, community work and job search activities" were not employees within the meaning of the Fair Labor Standards Act ("FLSA") (A19). The relevant distinction, according to the majority, are that: 1) "Johns is not a Title VII case and the workfare program was not governed by PRWORA"; 2) the Department of Labor, "the agency charged with interpreting the FLSA has rejected the Johns approach"; 3) Johns does not indicate "that the participants received the full range of benefits received by WEP participants or that they were required to perform useful work; and 4) "the Johns analysis . . . rest[s] on an artificial dichotomy: one must be either a welfare recipient or an employee and cannot be both" (A20).

The majority also purported to distinguish Brukhman v. Giuliani, 94 NY2d 387 (2000), "in which the New York Court of Appeals found that WEP participants are not employees within the meaning of a New York constitutional provision requiring contractors and subcontractors performing public work to pay their employees the prevailing wage for their work" (A21). The relevant difference, according to the majority, is that unlike Article I § 17 of New York Constitution, which "grants special economic rights to certain classes of workers," Title VII "accords the basic civil right of freedom from discrimination to all employees employed by covered employers" (A21-22).

Also addressed by the majority was O' Connor v. Davis, 126 F3d 112 (2d Cir. 1997), in which the court held that a college student who received federal work

study funding while doing field work at a psychiatric hospital could not sue under Title VII. In the majority's view, the critical factor distinguishing O'Connor was that the psychiatric hospital was not affiliated with the college that gave federal funds to the student, whereas "the City is both the payor and the recipient of the plaintiffs' services in this case" (A22).[6]

The majority stated further that workers' compensation, under which program WEP participants receive benefits, "is typically associated with employment," and the fact that only partial benefits may be granted, N.Y. Soc. Serv. Law § 336-c(2)(c) "is not dispositive in light of this circuit's definition of an employee" (A23).

The majority rejected the applicability of 42 USC § 608(c), which provides that a penalty imposed against a person "by reason of the failure of the individual to comply

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[6] The majority's conclusion that the City is necessarily "the recipient of the plaintiffs' services" is again a factual error. Tonja McGhee, one of the original plaintiffs, who eventually settled, was given a work assignment with the New York City Housing Authority, which is a public benefit corporation, not a City agency. *See, e.g.,* A.H.A. General Construction, Inc. v. New York City Housing Authority, 92 NY2d 20 (1998). Ms. McGhee is but one example of any number of WEP participants who are assigned to non-City employers, whether public benefit corporations or private businesses. In these instances, the City is the payor but not the recipient of the participant's services. Thus, the majority's analysis leads to the implausible result that some WEP participants (those assigned to City agencies) are employees while others are not.

with a requirement under the State program funded under this part shall not be construed to be a reduction in any wage paid to the individual." In the majority's view, the critical consideration with regard to 608(c) is that "Congress could easily have said that the benefits at issue in this case may not be considered wages," but chose instead to state that "the *withholding* of benefits (to penalize workers may not be considered a reduction of wages." The majority stated that "the fact that a penalty imposed on an individual WEP participant may not be considered a reduction in wages does not imply that the individual does not receive wages in the first instance" (A24). In addition, according to the majority, § 608(c) has the virtue of "allow[ing] the state to impose the penalty [on a delinquent participant] without violating the minimum wage requirement" (A25).

Finally, citing Pietras v. Board of Fire Commissioners, 180 F3d 468, 473 (2d Cir. 1999), the majority asserted that "a person need not receive wages in order to be considered an employee under Title VII," and that "the applicability of Title VII turns on the substance of the relationship between plaintiffs and defendants, not on labels affixed by statutes." (A25).

The Majority Opinion Regarding Preemption

The majority also addressed the City's contention that the promulgation of PRWORA preempts the application of Title VII to WEP participants, an issue that the District Court had not found necessary to reach. The nondiscrimination statute of PRWORA is codified at 42 USC § 608(d), which states:

d) Nondiscrimination provisions

> The following provisions of law shall apply to any program or activity which receives funds provided under this part:
>
> (1) The Age Discrimination Act of 1975 (42 USC 6101 et seq.).
>
> (2) Section 504 of the Rehabilitation Act of 1973 (29 USC 794)
>
> (3) The Americans with Disabilities Act of 1990 (42 USC 12101 et seq.).
>
> (4) Title VI of the Civil Rights Act of 1964 (42 USC 2000d et seq.).

The majority rejected the City's argument that, under the principle of "expressio unius est exclusio alterius," the failure to include Title VII among the enumerated nondiscrimination provisions precludes the application of that statute. According to the majority, the enumerated provisions are dissimilar from Title VII in that they are "non-discrimination laws applicable to programs or activities that receive PRWORA funds" and that "include functions like education and vocational training" that do not involve an employment relationship (A27). Title VII, according to the majority, "governs employment relationships whether federally funded or not" (A27). This dissimilarity, in the majority's view, renders the "expressio unius" principle inapplicable.

The majority also disputed the City's reliance on 42 USC § 617, which provides that "[n]o officer or employee of the Federal Government may regulate the conduct of

States under this part or enforce any provision of this part, except to the extent expressly provided in this part." In the majority's view, § 617 applies only to the government's enforcement powers but does not restrict the freedom of WEP participants "to sue under Title VII or any other applicable statute."[7]

The majority also found no significance in Congress's failure to include in PRWORA a provision comparable to that in the former AFDC/JOBS program, which stated that "[i]n assigning participants . . . to any program activity . . . individuals are not discriminated against on the basis of . . . sex . . . and all participants will have such rights as are available under any applicable Federal . . . law prohibiting discrimination." H.R. Rep. No. 104-651 at 908. The majority opined that "[b]ecause the AFDC/JLBS program was repealed in its entirety, no particular significance attaches to the revocation of this provision" (A28).

The majority further failed to find in a 1997 amendment to PRWORA authorizing Welfare-to-Work ("WtW") grants, 42 USC § 603(a)(5), any Congressional intent that Title VII not apply to PRWORA participants. WtW provides that "an individual may not be discriminated

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[7] The majority's assertion that the right to sue under Title VII does not involve government enforcement ignores the requirement that, as stated by this Court, "the statutory 90-day period within which an aggrieved party must file a Title VII action does not begin to run until receipt of a right-to-sue letter [from the EEOC] and notification that that the Commission's conciliation efforts have failed." Thus, commencement of an action under Title VII entails specific government enforcement procedures.

against by reason of gender with respect to participation in work activities engaged in under a program operated with funds provided under this paragraph." 42 USC § 603(a)(5)(I)(iii). The majority concluded, however, that because WtW is not limited to activities that are normally considered employment, "[t]he nondiscrimination provision in WtW would . . . serve a useful purpose even if Title VII were available to protect employees" (A29).

The majority also cited WtW's legislative history for the proposition that Congress intended no preemption. Of significance to the majority was Congress's failure to enact specific proposed language stating that a WtW recipient is not to be considered an employee (A30). The majority noted further that the Congressional Conference Committee declined to explicitly override a determination by the Department of Labor that "workfare participants may be covered 'employees'" (A31).

In addition, the majority gave weight to certain regulations enacted by the Department of Labor ("DOL") and the Department of Health and Human Services ("HHS"). Both agencies have regulatory provisions applying Title VII protections to PRWORA. The majority expressed its disagreement with the District Court, which had found that "because HHS and DOL have no authority to define Title VII's coverage, the regulations are not binding." In the majority's view, it is "well within the respective agency's authority" to determine "the manner in which discrimination claims are to be processed and the lack of preemptive effect attributable to Section 617. . ." (A32).

Finally, the majority disputed the City's contention that, in each instance, the agency's determination that Title VII was applicable represented a shift from a prior position. According to the majority, after initially "declin[ing" to reference Title VII in its regulations because it is not

charged with enforcing Title VII," HHS revised its regulations "only to clarify that PRWORA did not preempt Title VII's protection of employees who also receive TANF funds" (A35). The majority acknowledged that "DOL did not mention Title VII in the interim final version" of its regulations enacted under the 1997 amendment, but stated that this omission was merely because "some WtW participants may not be employees and thus may not be covered by Title VII" (A33).

The Dissent.

The dissenting opinion argued that under the terms of PRWORA itself WEP participants are not "employees" covered by Title VII. Contending that "[t]he welfare benefits received by WEP participants are not wages because [PRWORA] says they are not," the dissent cited 42 USC § 608(c), which states: "A penalty imposed by a State against the family of an individual by reason of the failure of the individual to comply with a requirement under the State program funded under [PRWORA] shall not be construed to be a reduction in any wage paid to the individual." The dissent criticized the majority for "reject[ing] the most natural and direct reading of the text; no wording can be framed by Congress to withstand an aggressive misreading" (A44).

The dissent argued further that, as acknowledged by the majority, benefits such as child care and carfare "are necessary only because the [welfare] recipient works" (A37). Citing O'Connor v. Davis, 126 F3d 112, 115-16 (2d Cir. 1997) ; York v. Association of the Bar, 286 F3d 122, 125-26 (2d Cir. 2002), and Pietras v. Board of Fire Commissioners, 180 F3d 468 (2d Cir. 2002), the dissent noted under the Circuit's case law, "things that are needed only because someone does work (such as the provision of a desk or a parking space) do not count in assessing

whether a person is receiving 'substantial benefits' amounting to remuneration" (A37). In the words of the dissent: "The WEP benefits cited by the majority opinion . . . do not even raise an issue of fact: they are wholly incidental to WEP participants' workfare assignments and they chiefly benefit the City. Such benefits cannot be deemed compensation in lieu of wages; no one needing gainful employment could work for such a package" (A46).

As for the extent to which WEP participants are entitled to workers' compensation, the dissent argued, citing US v. Demko, 385 US 149 (1966), that "[w]orkers' compensation is chiefly a benefit for the employer: without it, WEP participants could sue the City for tort damages" (A47).

The dissent observed as well that since protection from discrimination is already secured for WEP participants by New York State law, N.Y Soc. Services Law § 331(3), "[t]he majority's conferral of employee status on WEP participants offers no incremental protection from sex discrimination" (A38). The dissent proceeded to argue: "Since the protection against sexual discrimination afforded by the majority opinion is redundant, the only likely impact of this case will be to frustrate important welfare reforms by impairing the flexible and temporary nature of WEP assignments" (A38). Thus, for example, according to the dissent, "[i]f WEP participants are employees under federal common law, it may then follow – and it will certainly be argued – that they have a right like other employees, to unionize" (A38).

In the view of the dissent, the instant case is indistinguishable from O'Connor, in which the Second Circuit "explicitly rejected the arguments [i] that receipt of federal work study funding . . . was sufficient to make her a hospital employee and [ii] that such a governmental benefit could be considered compensation." 126 F3d at 116, n.2.

The dissent argued that the majority's attempt "to distinguish O'Connor on the ground that here 'the City is both the payor and the recipient of plaintiffs' services" is unavailing because it "glides over the dispositive question: just what is being *paid?* As O'Connor holds, unless the payor is being paid *compensation,* the payee is not an employee [emphasis in original]" (A41). As noted by the dissent, O'Connor "held that work study funding did not support an inference of employment even though the funding was calculated on the basis of the number of hours worked" (A43). [8] 126 F3d at 112, n.2.

Also futile, in the view of the dissent, was the majority's attempt to distinguish Brukhman v. Giuliani, 94 NY2d 387 (2000), on the ground that it would be "foolhardy to assume that the New York Court of Appeals would extend its interpretation of the prevailing wage provision [of the New York Constitution] to Title VII." The dissent cited categorical language in the Brukhman opinion, which states: "[WEP] participants simply are not 'in the employ of' anyone – that is the very reason they are receiving welfare benefits and required to participate in the Program, until they can find or be placed in jobs with the customary array of traditional indicia of employment" (A41). Id. at 395.

The dissent noted further that, in light of Johns v. Stewart, 57 F3d 1544 (10th Cir. 1995), the majority opinion has created a split in the circuits (A48). The dissent rejected the majority's attempt to distinguish Johns as a case under the FLSA, rather than Title VII, noting that "the definition of 'employee' in the FLSA is considerably more inclusive than the common law definition used in Title VII

[8] See footnote 5.

. . . . The Johns analysis is therefore applicable *a fortiori*"(A49)

As for the majority's observation that DOL has implicitly rejected Johns, the dissent noted that this purported rejection occurs in a DOL "Guidance," which, as "the majority concedes . . . [is] entitled to no deference beyond [its] 'power to persuade." Moreover, according to the dissent, '[t]he (hedged) assertion in the DOL guidance is without an express or implied basis; it is unpersuasive because that which does not explain cannot persuade" (A50).

The dissent also dismissed the majority's speculation that the Johns plaintiffs may not have "received the full range of benefits owing to WEP participants" and that they may not have been "required to perform useful work." According to the dissent, "[t]he phrase 'full range of benefits' is an absurd misdescription; and the relevant passage in Johns gives no support to the majority's speculation about the nature of the benefits received or the work performed by the plaintiffs" (A50). The passage cited by the dissent states: "Although [the workfare] participants may perform the same function as regular employees at some of the projects to which they are assigned, they differ from state employees in that they do not receive the same salary, safe working conditions, job security, career development, Social Security, pension rights, collective bargaining, or grievance procedures as do the actual employees." Johns, 57 F3d at 1559.

Finally, the dissent rebutted the majority opinion's "suggest[ion] that Johns rested on an 'artificial dichotomy' between employment and WEP participation." As noted by the dissent, "the Johns court stated – as a matter of fact, not presumption – that the workfare participants at issue 'were completely unlike state employees in every respect" (A51). Johns, 57 F3d at 1558-59.

Having found, based on the federal common law indicia of employment, that WEP participants do not have recourse to Title VII protections, the dissent refrained from addressing the majority's preemption analysis.

F. The City of New York's Petition for Rehearing En Banc

On March 2, 2003, the City filed a petition in the Second Circuit for rehearing en banc. The petition argued that the majority decision directly contradicted the Circuit's established case law.

On May 27, 2004 , the Second Circuit denied the City's petition for rehearing en banc.

REASONS FOR GRANTING THE PETITION

By defining participants in WEP as "employees" under federal common law, the Second Circuit has limited the City's ability to conduct the program in a manner optimally calculated to serve its intended purpose, *i.e.,* to provide recipients with the training and experience that will enable them to achieve autonomy through gainful employment. As stated by the dissenting opinion below, "the only likely impact of this case will be to frustrate important reforms by impairing the flexible and temporary nature of WEP assignments." Citing 29 USC § 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . ."), the dissent observed further that under the definition of "employee" advanced by the majority, an attempt by WEP participants to unionize is virtually inevitable. Such a development could cripple WEP.

Moreover, the majority opinion's designation of WEP participants as "employees" is based on a deeply flawed analysis of the indicia of employment as they apply in this case, and flies in the face of well-established case law. Similarly, the majority's preemption analysis, though not addressed by the dissent, conflicts with basic tenets of statutory construction.

Finally, as noted by the dissent, the majority opinion opens a split between the Second and Tenth Circuits. Despite the majority's unpersuasive attempt to distinguish Johns v. Stewart, 57 F3d 1544 (10th Cir. 1995), the Tenth Circuit's holding that workfare participants are not employees pursuant to the FLSA, stands in direct contradiction to the majority determination in this case. The split between circuits compounds the pressing nature of the need for a granting of certiorari.

Indicia of Employment Under Title VII.

As demonstrated by the dissent's careful analysis of the majority's reasoning, the majority's determination that WEP participants are employees under Title VII is deeply flawed and inconsistent with established case law.

Title VII defines an employee as "an individual employed by an employer." 42 USC § 2000e(f) (1994). In Johns v. Stewart, 57 F3d 1544 (10th Cir. 1995), the Tenth Circuit was asked to decide whether welfare beneficiaries who participated in a work experience program had an employment relationship with the government. The Court held that the work experience component of the relationship cannot be examined in isolation. Work experience is just one component of a comprehensive assistance plan, and it is the overall nature of the relationship between government and beneficiary that must be examined. Id. at 1558. On that basis, the Tenth Circuit

held that the plaintiffs in Johns were not employees. When the similar overall relationship here is examined, it is apparent that the plaintiff WEP participants are likewise not employees.

TANF is a means-tested welfare or public assistance program, in which assistance is provided to needy families. 42 U.S.C. § 601(a). The circumstances under which assistance is provided, and reduced or terminated, are not compatible with an employment relationship. The assistance is provided to the family, not to an individual. § 608(a)(1). In the WEP program, if TANF recipients are sanctioned for failure to perform their WEP assignments, the assistance to the other members of the household is not reduced; only that portion of the assistance provided for the non-complying individual is reduced or discontinued. SSL § 342; 12 NYCRR §§ 1300.12(b)(2),(4),(6); 1300.12(d)(1); 1300.12(e)(2),(3); 42 USC § 607(e)(1)(A). Thus, assistance continues, even though no WEP assignment is performed. Further, PRWORA explicitly states that reductions of assistance imposed as a penalty for noncompliance (for any reason) "are not considered wage reductions" and "shall not be construed" as such. 42 USC § 608(c). As observed by the dissent in this case, the majority's assertion that the benefits granted to WEP participants are nonetheless wages is an "aggressive misreading" that "reject[s] the most natural and direct meaning of the text."

PRWORA also mandates that the state reduce or eliminate assistance as a sanction for a variety of reasons that have nothing to do with an employment relationship: for noncooperation in establishing paternity or obtaining child support, § 608(a)(2); for failure to assign to the State any rights to support from any other person, §608(a)(3)(A); and for violating a condition of probation or parole, § 608(a)(9). For recipients who are teenage parents, the state

must reduce or eliminate assistance, if they do not attend high school or an approved alternative training program, § 608(a)(4), or do not reside with a parent, other adult relative or legal guardian, § 608(a)(5)(A). Further, the state must deny assistance for ten years to persons convicted of having fraudulently misrepresented their residence to simultaneously receive benefits in two or more states, § 608(a)(8). The statute also provides that assistance shall be reduced or eliminated for failure to engage in work activities. § 607(e).

Case law involving work experience programs supports the conclusion that work experience is not employment. In Brukhman v. Giuliani, 94 NY2d 387 (2000), a case which involved the WEP program in New York City and a State prevailing wage statute, the New York Court of Appeals stated:

> ...[workfare] participants simply are not "in the employ of" anyone--that is the very reason they are receiving welfare benefits and required to participate in the Program, until they can find or be placed in jobs with the customary array of traditional indicia of employment.

As observed by the dissent, this language refutes the majority's conclusory assertion that "it would be foolhardy to assume that the New York Court of Appeals would extend its interpretation of the prevailing wage provision to Title VII."

In the pertinent case of Johns v. Stewart, 57 F3d at 1557, the issue was whether welfare beneficiaries participating in a Work Experience and Training project

were employees for purposes of the Fair Labor Standards Act ("FLSA"). Johns is particularly noteworthy because the FLSA contains an exceptionally broad definition of employee, a definition considerably broader than that contained in Title VII. *See* 29 USC §§ 203(g), (e); (defining "employ" under the FLSA as including "to suffer or permit to work" and "employee" as 'any individual employed by an employer"); Frankel v. Bally, Inc., 987 F2d 86, 89 (2d Cir. 1993) ("Title VII do[es] not contain the same expansive definition of the term 'employ' used in the FLSA."); *see also* Nationwide Mutual Insurance Company v. Darden, 503 US 318, 326 (1992). As noted by the dissent, the breadth of the FLSA definition makes the Johns analysis applicable to the Title VII *a fortiori,* and renders futile the majority's attempt to distinguish that case. Despite that very breadth, the Tenth Circuit found that "[t]he overall nature of the relationship between Plaintiffs and Defendants is assistance, not employment. Indeed, [work experience] participants are completely unlike state employees in every respect." Id. at 1558.

The court then enumerated the ways in which participants are unlike employees. They apply for public assistance, not a state job, and receive their assistance checks through the social services payment system, not from the state payroll. Taxes are not withheld from their benefits and they do not accrue sick or annual leave. Recipients also do not have job security, career development, Social Security, pension rights or collective bargaining. Id. at 1558-59. The court noted that as a condition for receipt of benefits in that program, recipients were required to meet a needs test; be unemployable, marginally employable or over sixty years old; have no dependent children and be able to perform work experience and agree to participate in education, skills development, and job training. Id.

Similar conditions exist here. Participants apply for public assistance, not a job. They are not required to participate in work experience if they are incapacitated or over sixty-years-old, have a child who is under one-year-old, or have to attend to an ill or incapacitated member of the household. SSL § 332(1). The social services district is required to provide participants with available supportive services, including transportation and child care, to enable them to participate in the program. SSL § 332-a. Participants are also required to cooperate in establishing paternity and enforcing child support obligations, SSL § 334(2), and in an assessment, by the social services district, of their need for supportive services, their skills and experience. SSL §335(3). Participants must also participate in work activities, which in addition to work experience, may include: subsidized or unsubsidized employment; job search activities; on-the-job training; community service activities; vocational educational training and job skills training. SSL § 336(1). Participants who have not obtained a high school diploma may be required to attend educational activities. SSL § 336-a. Refusal to comply with any of these requirements may lead to a reduction or termination of benefits. SSL § 342.

It is also self-evident that participants in these interim assignments do not have job security, career development, Social Security or pension rights, and that taxes are not withheld from their benefits. Further, the New York City Board of Certification of the Office of Collective Bargaining, which administers public sector labor relations in New York City, New York City Administrative Code, New York City Collective Bargaining Law § 12-301, *et seq.*, held that participants in an earlier work experience program were not entitled to be represented for collective bargaining. District Council 37 v. City of New York, New York City Board of Certification, Decision 21-81 (1981).

In addition, under SSL § 342, a WEP participant's family continues to receive non-cash benefits despite the participant's failure to perform a work assignment, undermining the contention that such benefits are provided as remuneration. Benefits that are not contingent upon the performance of work cannot be deemed payment for that work.

Contrary to appellants' contention, the benefits at issue in this case -- *i.e.*, the cash grant, certain child care expenses, workers' compensation, and monetary reimbursement for transportation costs -- are not "job-related" but, rather, "need-related." The very title of the program, "Block Grants to States for Temporary Assistance for Needy Families" 42 USC, Subchapter IV, Part A, emphasizes the need-based nature of these benefits. This is "a means-tested welfare or public assistance program." 42 USC § 608a. The amount of benefits provided is not based on the amount or type of work experience performed, but is based solely on the need of the recipients.[9] The benefits are provided if the individual performs no work experience, but instead is assigned to a different work activity, such as vocational educational training or job search and job readiness assistance. 42 USC § 607(d)(6),(8). Thus, the benefits cannot plausibly be regarded as remuneration for work.

The nondiscrimination provisions of PRWORA, 42 USC § 608(d).

As already noted herein, Title VII is conspicuously absent from the nondiscrimination statues enumerated in 42

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[9] See footnote 5.

USC § 608(d). Since Title VII is well known to Congress, its absence can hardly have been an oversight.

The language of § 608(d) is unambiguous. Under the heading labeled "nondiscrimination provisions" are listed four nondiscrimination statutes. For the purposes of determining the applicability of Title VII, the relevant rule of statutory construction is "*expressio unius est exclusio alterius*" (the expression of one thing is the exclusion of another) also applies here. In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 US 163, 167 (1993) the statute at issue was Fed.R.Civ.P. 9(b), which enumerates two types of actions to which the statute applies. The Supreme Court held that an action that was not enumerated, was not covered, citing "*expressio unius est exclusio alterius*." In the instant case that principle dictates that Title VII is not among the federal statutes to which individuals covered by PRWORA have recourse.

The reasoning cited by majority opinion for its conclusion that "*expressio unius*" is inapplicable in this case does not withstand scrutiny. According to the majority, Title VII does not "go hand in hand" with the enumerated statutes, and its absence from the list is consequently without significance. But the category that unites the enumerated items, and which is explicitly stated by the statute itself, is "nondiscrimination provisions," a rubric under which Title VII unquestionably falls and which entitles it to "go hand in hand" with the statutes enumerated.

Moreover, in its attempt to show that Title VII is in a category separate from that of the other enumerated statutes, the majority proposed distinctions that are inaccurate. As characterized by the majority, the enumerated statutes are "non-discrimination laws applicable to programs or activities that receive PRWORA

funds" and that "include functions like education and vocational training" that do not involve an employment relationship (A27). The majority sees Title VII as distinct in that the statute "governs employment relationships whether federally funded or not" (A27). Yet the ADA and the ADEA apply both to federally and non-federally funded employment programs. In addition, the ADA applies to both federally and non-federally funded non-employment programs. Thus the distinctions advanced by the majority are not correct.

The majority has failed to advance any plausible argument to show that "*expressio unius*" should not apply in this instance. Accordingly, the terms of PRWORA itself excludes Title VII from the list of federal nondiscrimination remedies available to WEP participants.

CONCLUSION

For the reasons set forth, the City respectfully asks this Court to grant its petition for a writ of certiorari.

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